No. 1035

APR 1 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____, 1946

JOHN D. PITTMAN, JOSEPH L. GARVEY AND
J. D. PITTMAN TRACTOR CO., INC.,
a corporation,

Petitioners.

vs.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

JESSE KILGORE BROCKMAN,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

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JOHN D. PITTMAN, JOSEPH L. GARVEY AND J. D. PITTMAN TRACTOR CO., INC., a corporation,

Petitioners.

vs.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to The United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners (Appellees in the Court below), John D. Pittman, Joseph L. Garvey and J. D. Pittman Tractor Company, Inc., a corporation, separately and severally, pray that a writ of certiorari issue to review the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, entered on the 6th day of November, 1945, a decree denying Appellees' petition for rehearing, rendered on January 7, 1946, and the mandate issued on January 22, 1946.

A transcript of the record in the case including the proceedings of said Court is furnished herewith, in accordance with the Rules of this Court.

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code 28, United States Code 347, as amended by the Act of February 13, 1925.

SHORT STATEMENT OF THE CASE

On August 5, 1943, a complaint was filed in the District Court of the United States for the Southern Division of the Northern District of Alabama, by the United States of America, on the relation of Charles M. Hewitt, plaintiff, and against the defendants, John D. Pittman, Joseph L. Garvey and J. D. Pittman Tractor Company, Inc., being a civil action, claiming Fifty Thousand Dollars as damages, under the provisions of Title 31, Sections 231-235 (R.S. 3490-3494 inclusive) of the United States Code, together with costs of suit. (Tr. 1-8).

The complaint was based upon information contained in an indictment returned on December 12, 1940, by a Federal Grand Jury, in the Northern District of Alabama, to which on Dec. 13, 1940, defendants pleaded nolo contendre and were fined by the Court.

These defendants filed their answer November 29, 1943. (Tr. 19). Notice of appearance was filed March 10, 1944. (Tr. 21). Entry of appearance by the U. S. District Attorney on March 10, 1944. (Tr. 22).

Under the orders of the District Judge, the Clerk of the court, transmitted to the Attorney General of the United States, by registered mail, a certified copy of the complaint and other *pleadings* filed in the case on the 13th day of June, 1944.

The defendants, in the District Court, filed their motion to dismiss the action on August 30, 1944 (Tr. 22), and at the same time filed an affidavit by the Relator,

Charles M. Hewitt and his attorney, George Rogers (Tr. 30), in which affidavit the relator and his said attorney gave evidence of the facts that the complaint was based entirely on the evidence in the possession of the United States or an agency, officer or employee thereof; that they did not have any evidence or information not at that time in possession of the United States; and that they did not before or at the time of the filing of said suit serve a copy on the United States District Attorney and did not voluntarily disclose to the Attorney General of the United States substantial evidence and information which was not theretofore in possession of the Department of Justice of the United States, and that the facts alleged in said complaint were obtained from a Federal indictment returned by a Federal Grand Jury for the said district, against said defendants and from no other source.

On April 11, 1945, the Honorable Clarence Mullins, District Judge, dismissed said action on the ground that the court had no jurisdiction to hear, try or determine the same. (Tr. 31).

On May 14, 1945, notice of appeal to the Circuit Court of Appeals for the Fifth Circuit was filed by the Government.

Designation of the point on which Appellant relied was filed on May 14, 1945, in which the United States designated the point on which the United States intended to rely as follows:

"A qui tam suit, pending before the enactment of Public Law 213, 78th Congress, 1st Session, 57 Statutes, 608, based on information already in possession of the United States when the action was instituted and taken over by the United States, pursuant to Public Law 213 for the purposes of carrying it on is not abatable for want of jurisdiction under the last sentence of Section 3491 (C) of the Revised Statutes. (Tr. 35).

The United States Circuit Court of Appeals handed down its opinion reversing the action of the District Court in dismissing said action on November 6, 1945; thereafter Appellees in the Court below filed their motion for rehearing in said cause, which was denied on January 7, 1946, followed by mandate issued January 22, 1946.

TIME TO FILE PETITION FOR WRIT OF CERTIORITI

Time is fixed by Title 28, Section 350 of U. S. Code

Order for Mandate is "judgment" from which date the time for filing petition for certiorari should be computed.

Commissioner of Int. Rev. vs. Bradford Estate, 65 Supreme Court 1157—325 U. S. 283 and cases cited.
Angelus Milling Co. vs. Com. Internal Rev. 65 Supreme Court 1162—325 U.S. 293.

The Application for rehearing tolls the running of the 3 months period.

Department of Banking, etc., v. Pink, 63 Supreme Court 233—317 U.S. 264.
U. S. vs. Seminole Nation—299 U. S. 417—57 Supreme Court 283.

And time does not begin to run until after disposition of motion for new trial. U. S. vs. Seminole Nation, Supra.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the District Court had jurisdiction to proceed with a suit pending when Public Law 213 was enacted, brought by a private relator under Section 3491 of the Revised Statutes of the United States (the Government having since entered its appearance), after it was made to ap-

pear that when begun, it was based upon evidence already in the possession of the Government and in the absence of a disclosure of evidence by the relator before the suit was filed.

2. Does the entry of appearance by the Government after the suit was filed and after the enactment of Public Law 213 change the suit from a private suit to a public suit?

3. Was the Court of Appeals confined in its opinion to the one point designated by the Government on appeal by its own rules and the law governing appeals?

4. Was the Government placed in the same position as the informer by the provisions of Clause B and C of Public Law 213?

STATUTES INVOLVED

12 Stat. 696 R.S. 5438, Sections 3490-3494 of the Revised Statutes of the United States, 31 U.S.C. 231-234.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that there exist special and important reasons for the granting of the writ for certioriari herein prayed for because:

1. The decision of the District Court and the Circuit Court of Appeals have decided an important question of Federal Law which has not been, but should be settled by this Court.

2. The decision of the Circuit Court of Appeals is an untenable construction of an important Federal statute in that it:

(a) Held that the District Court in dismissing the action based its action on the one ground that the relator did not have information and evidence not at that time

in the possession of the Government while the contrary is true. (Exhibit C).

(b) That the only notice required to be given to the Attorney General was the notice given by the clerk of the court, contrary to the provisions of clause C of Public Law 213.

(c) That the provisions of Clauses D and E were construed independently, and without reference to Clause C, which is controlling.

(d) That Public Law 213 is being construed by both Judges and Courts of Appeal resulting in confusion as to the meaning of the law and the decision of this court is necessary for the guidance of inferior courts in deciding the questions involved under the law.

BRIEF AND ARGUMENT

A. The order of the District Court dismissing the action was eminently correct.

The Government contends that when a qui tam action is taken over by the United States it ceases to be a private suit and becomes a public action (Br. 11). We urgently insist this is not so, but is controlled by the exception in clause B and the jurisdictional limitations as provided in Clause C.

The Government further contends that the jurisdiction limitations contained in clause C of Public Law 213 apply only to qui tam suits brought by informers. This contention is based on nothing more than a bare assertion.

Petitioners maintain that the decisive test of jurisdiction in this suit and in any suit instituted by a private person is whether, when the suit was brought it was based upon evidence or information already in the possession of the Government and no other. If it was,, we insist that the Court had no jurisdiction.

Section 231 U.S.C. (R.S. 3490, 5438) creates the liability of persons making false claims.

Section 232 U.S.C., as amended June 25, 1936, C 804, 49 Stat. 1921, gave to the District Courts of the United States full power and jurisdiction to hear, try and determine such suit.

Section 233 U.S.C. (R.S. 3492) prescribed the duties of the District Attorney and requires *due diligence*.

Section 234 (R.S. 3493) was repealed by the enactment of Public Law 213, approved December 23, 1943, C 377 (57 Stat. 609).

Section 235 (R.S. 3494) provided that such suits must be commenced within six years from the *commission* of the act and not afterwards.

Section 232 as it stood before the amendment contained the clause which is now clause A, together with the sentence contained in clause B, with the exception that the prior law did not contain the provision *"Except as hereinafter provided,"* as in clause B, which is the predicate on which the amended act is based.

There was substituted for Section 234, (which was repealed by the amended Act), the provisions contained in clause (C), (D) and (E).

Except as to the question of jurisdiction clause (C) applies to future suits under clause (B), not pending suits, as to the future suits it provides for notice by "serving a copy of the complaint on the District Attorney and by sending by registered mail to the Attorney General of the United States a copy of such bill with a disclosure in writing of substantially all evidence and information in his possession material to the effecting prosecution of *such* suit." The United States shall have sixty days, after service as above, within which to enter appearance in *such suit* and to carry it on and proceed as if it were originally instituting the suit. (See Exhibit A).

Italics Supplied

It will be noted that in order to confer jurisdiction on the court clause C requires three things, as conditions precedent:

1. That the informer has information and evidence not possessed by the Government.
2. That he must serve a copy of the complaint on the United States District Attorney.
3. That he shall send by registered mail, to the Attorney General of the United States a copy of the bill with a disclosure in writing of substantially all evidence and information material to the effective prosecution of such suit.

Failure to comply with these provisions takes away the jurisdiction of the court and in such case the action of the District Court in dismissing the suit in accordance with clause C was eminently correct. The evidence is in the record. (Tr. 30).

The provision that, "no abatement shall be had as to a suit pending on December 23, 1943, *if* before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice is controlled by the word *if*, which is significant and cannot be read out of the Statute.

We invite your attention to the fact that clause (C) makes no provisions for stay of proceedings or notice to the Government or for the time within which the government must act in pending suits. Clause (D) provides for a notice to Attorney General, after which he is to have sixty days to appear and carry on *in accordance with clause (C)*. This does not mean that the Attorney General may appear in and carry on such suit without regard to clauses (B) and (C). It is specifically provided that the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit *in accordance* with clause (C). The clauses must be read together and harmonized

and the limitation on the jurisdiction of the court appearing in clause (C) must be held to apply equally to pending suits taken over and carried on by the Attorney General under clause (B). If clause (C) in the present suit destroys the jurisdiction of the District Court, as we maintain it does, particularly coupled with the provisions of clause (B), then the Attorney General could not, proceed with the suit.

We are free to admit that if the informer had complied with the terms of the Act and had information and evidence not possessed by the Government or any of its officers or agents, then clause (D) would have full scope and operation.

If the construction placed upon the Act by the Court of Appeals is correct it leaves no field of operation for the last sentence of clause C, which we maintain is the very heart of the case. We cannot believe that Congress would make useless legislation. Congress clearly enacted clause C for the purpose of providing jurisdictional limitations on the Courts. If it had intended otherwise it would have said so in no uncertain terms. We maintain that the legislation intended just what it said, and the only way in which the Court could take jurisdiction was that, if the informer had complied with the terms of the Act and had information or evidence not possessed by the Government. The Attorney General could examine such information and evidence and then determine whether or not it should proceed with the original suit or bring a new suit. (Exhibit C).

Clause (E) of Public Law 213 has to do with compensation of the informer in the event the court has jurisdiction, but if the court has no jurisdiction, then, of course, the provisions of both clauses (D) and (E) are inoperative, and the contentions of the government that it can enter appearance and carry on the suit is contrary to the provisions of the statute.

This statute as interpreted by the district court left the Government whatever remedy it had. If the Government's remedy to recover from these alleged fraud doers is barred, it is solely because the government suffered the period of limitations to expire without action.

The situation in which government finds itself by reason of its inaction cannot honestly and justly be visited on the court below. The effect of the ruling of the district court and the effect of Public Law 213 is that the court is without jurisdiction of a suit, which, when commenced was based upon evidence or information in possession of the government. The government having had the information, was in a position to institute its own suit at any time during the period of limitations. It voluntarily chose not to institute a suit until after the period of limitations had fully expired. It should not now he heard to cast responsibility for this course of conduct upon the court below.

The government admits (in its brief, page 14, foot note 3) that as the six year limitation provided by Section 3494 (31 U.S.C. 235) had expired, the United States presumably could not now institute a separate action. The government offers the further excuse (brief p. 26, foot note) in which it says:

> "Following the criminal action, the Claims Division of the Department of Justice was corresponding with the United States Attorney and had under consideration the question of possible liability of the defendants, but as yet had made no determination of the matter when this action was filed. Prior to 1943 it was generally considered that the filing of a qui tam action preempted the right of the Government to sue for the cause stated therein. The contrary was not established until September 29, 1943, when the Eighth Circuit Court of Appeals rendered its decision in the case of United States vs. Baker-Lockwood Mfg. Co., 138 F. 2d 48. Shortly thereafter Public Law 213 was enacted and it was considered the rights of the United States were amply protected under

the provision of clause (D) authorizing the Attorney General to appear and carry on the qui tam action. In this connection it will be noted that following enactment of Public Law 213, the Supreme Court, considering the question therein moot, granted the petition of the qui tam plaintiff in the Barker-Lockwood cases, for a writ of certiorari, vacated the judgment of the Circuit Court of Appeals and remanded the cause to the district court with directions to proceed in conformity with the provisions of Public Law 213. Nathanson v. United States, 321 U.S. 744, 746."

This shows conclusively, lack of due diligence by the Government.

The Government also admits that the qui tam action, August 5, 1943, is based upon the same evidence or information as was involved and alleged in the criminal action, and that the qui tam plaintiff contributed nothing to the enforcement of the law, but in effect, by the filing of this action interfered with the orderly processes of government in the enforcement of civil remedy for fraud perpetrated against the United States. The question naturally arises as to why did the Government wait more than six years to bring suit instead, by its action, allowed a qui tam plaintiff to bring suit in a very short time before the six years statute of limitation had run.

B. The paramount purpose of the Congress as expressed repeatedly by those in charge of the bill in both houses of Congress was to abolish racketeering in suits brought under the statute.

The plain language of the statute is consistent with the legislative purpose.

When Public Law 213, H.R. 1203, was submitted to the House and Senate, the Conferees made an analysis of the bill and the bill was adopted with the full knowledge of the

Senate and House of this analysis, and the purposes of the Act.

We invite attention of the Court to this analysis. (Exhibit B). In this analysis the following language appears:

"PROVIDED, That the court in which suit is pending shall stay further proceedings until the Attorney General shall have thirty days' opportunity to move and shall give notice to the Attorney General; and the provisions preceding this provision shall not be applicable to any such pending suit unless the Attorney General shall have within thirty days after receipt of such written notice, move the court *to dismiss the suit.*

"PROVIDED further, that if after dismissal under this act of any such pending suit a person having brought such suit makes full disclosure and request in accordance with the provisions of said Section 3491, as amended by Section ..... of this Act, and the Attorney General declines in writing to comply with such request, or allows six months to elapse *without causing suit to be brought,* such person may bring and carry on a *new suit* based upon the same act, acts and transactions. If the previous suit by such person was timely, the time within which such *new suit* may be recommended by such person shall not expire until eight months after the date of the enactment of this Act, or until the expiration of the time provided by Section 3491 of the Revised Statutes, whichever is later:

"PROVIDED further, That the Attorney General *may cause a suit to be brought based in whole or in part upon upon the act, acts, or transactions involved in such pending suit* previously brought, if the previous suit brought by such person was timely, the period within which the Attorney General may *cause a suit to be brought* shall not expire until eight months after the enactment of this Act, or until the expiration of the time provided by Section 3491, whichever is later."

By Section 3 of the bill, it is provided that nothing in the act shall affect any such suit which was filed prior to June 15, 1942, or in which a final judgment has heretofore been entered. (Italics supplied).

We invite attention to the two questions mentioned in this analysis: one being that if the Attorney General declines to bring suit, that the informer may bring a *new suit,* and second, to the proviso that the *Attorney General may cause a suit to be brought* in whole or in part, by the acts, or transactions involved in such pending suit previously brought, if the pending suit was timely, the period in which the Attorney General *may cause a suit to be brought* until eight months after enactment of this Act, or until the expiration of the time provided by Section 3491. (Exhibit B).

The record in this case does not show that the informer brought a new suit, or that he has notified the Attorney General, and that the Attorney General did not cause a suit to be brought as provided, but instead entered an appearance and claimed the right to proceed under clause (D) Public Law 213, which said clause applies only to future suits and not to suits pending.

C. Where construction is doubtful, the legislative history may be looked to for the intention of Congress to discover the objects to be attained, the evils aimed at and the remedy to be applied, and the legislative intent is controling:

Wright v. Vinton Branch Bank, 300 U.S. 440.
Merchants National Bank v. NuEnamel Corporation, 305 U.S. 315, 59 Sup. Ct. 191.
U. S. v. Dickson, 310 U.S. 554.
Clifford F. McEvoy v. U. S., 322 U.S. 102.
U. S. v. American Trucking Association, 310 U.S. 534.
U. S. v. Stone and Downer L. Co., 274 U.S. 225.
Royal Oak Indemnifying Co. v. American Bonds and Mts. Co., 289 U.S. 163.
U. S. v. Rosenblum Truck Lines, 315 U.S. 50.
Lincoln v. Ricketts Trustee, 297 U.S. 373.
Com. Internal Revenue v. Griffin, 381 U.S. 371.
Oswa v. U. S., 260 U.S. 178.
U. S. v. Cooper Corporation, et al, 312 U.S. 600, 61 Sup. Ct. 742.

The amended act, Public Law 213, was passed at the request of the Attorney General of the United States.

At the time the bill was presented to the Senate for final action, the judiciary committee made an analysis of the aims and purposes of the enactment of Public Law 213. (Exhibit B).

It is clear that Congress enacted the amended statute, Public Law 213, with full knowledge of the request of the Attorney General, of the analysis of the judiciary committee of the Senate and of the debates engaged in both by the House and Senate.

C. It is well settled that statutes are to be construed in accordance with the Congressional intent and that if a statute needs any aid to its construction, resort may be had to the history of the legislation.

Wright v. Vinton Branch Bank, 300 U.S. 440.
Com. Internal Revenue v. Griffin, 381 U.S. 371.
Armstrong Paint and Varnish Co. v. NuEnamel Corp., 305 U.S. 515.
Oswa v. U. S., 260 U.S. 178.
U. S. et al v. American Trucking Assn., 310 U.S. 534.
U. S. et al v. Rosenblum Truck Lines, 315 U.S. 50.
U. S. v. Cooper Corporation, supra.

In the Senate September 17, 1943, in the proceedings and debates of the *78th Congress, First Session, we find further discussion by Mr. Revercomb and others, Appendix C."*

The conceded facts in this case bring them directly within this specific legislative purpose: to outlaw cases where the language of the criminal indictment was copied into the civil complaint. Certainly the courts had adequate power without additional legislation to protect the government

from disclosures in a civil suit which would prejudice it in a pending criminal proceeding.

The claim of the Government that the "chief objective" of Public Law 213, was to give the Atorney General full control of all proceedings under the false claims statutes and thereby to modernize and make more efficient the enforcement of the civil and criminal remedies created, but that statute rests upon nothing more substantial than mere assertion.

89 Congressional Record 7678:

> In the debates, Mr. Rovercomb made the following statement. * * * The Department of Justice came before the Judiciary Committee and wanted that law repealed. A majority of the committee decided not to repeal the law, but has reported to the Senate a bill which, in substance, provides that before any individual may bring such a suit upon information of fraud in the case of a Government contract, he must submit to the Attorney General of the United States the information upon which he would act, and the Attorney General may then institute the suit or may refuse to do so. If, in his wisdom, he does not think the suit should be brought or if 6 months elapse after notice has been given *by the informer without suit being brought by the Attorney General,* then the informer may bring suit. That, in substance is the measure as reported to the Senate after being changed by the Judiciary Committee."

It thus appears that the draft of the Bill desired by the Department of Justice was not enacted. A mere reading of the statute should satisfy anyone that the statute does not give the Attorney General "full control of all proceedings under the false claim statute," but on the contrary, it places the private person who is a bona fide informer, and not a racketeer, in a position where he may decide whether suit shall be instituted and may spur and stimulate the Attorney General into action after the suit is instituted and if the Attorney General does not act, the informer is put in a

position where he may himself carry on without any control from the Department of Justice except to approve a settlement. As was repeatedly said in the debates, the Congress insisted upon protecting the honest informer.

The further claim is made that Public Law 213 is a mere procedural statute. The statute is one plainly designed to deprive the Court of jurisdiction of a racketeering law suit, that is, one brought by someone who has not given the Government any information but has copied the Government's information in a civil complaint.

The manifest purpose of Congress in amending the informer statute was to bring to an end the practice of filing suits by persons who had no information or facts of their own but copied the allegations of a criminal indictment into a civil complaint merely changing the title and adding the prayers.

The argument that even though the literal language of Public Law 213 supports the interpretation of the Court below that such interpretation cannot stand, is based upon the assumption that the Court's interpretation of the language produces an unreasonable result at variance with the purpose and policy of Public Law 213. We have already pointed out that the Government's claim in this regard is nothing more than mere assertion. The literal language of the statute is wholly consistent with and in harmony with the intention of the Congress as we have adequately demonstrated heretofore in this brief. The cases cited by the Government therefore are without application.

At the time the Judiciary Committee submitted its report to the Senate, it made an analysis of the bill (Exhibit B), in which it stated that the bill had been amended to protect the compensation of *genuine informers who comply with the provisions* respecting notice to the Attorney General and also to protect such persons who have pending suits filed prior to June 15, 1942.

The Government had and still has its remedies in a qui tam action, which were not changed by the enactment of the amendment Public Law 213, namely, Sections 3490, 3492 and 3493 of the Revised Statute of the United States. Laxity in enforcement cannot affect the judicial limitations as provided in Public Law 213 and its dismissal of this action by the District court was proper.

Some question is raised in Appellant's brief that the construction of the Act, Public Law 213, providing for dismissal for want of jurisdiction would be absurd and would leave the Government without remedy. The Government had and has its remedies under the law as it existed before and after the enactment of Public Law 213, Sections 5438, 3490 and 3492, Revised Statutes of the United States.

It is stated in the complaint filed in the Court (Tr. p. 2), that the acts complained of were committed in September, 1937, and in the Appellants brief, page 21, it is stated that the acts were committed during the years 1937 and 1938. The Government had its remedies immediately, but through laxity, oversight or otherwise, no civil suit was begun until the suit of the informer was filed on August 5, 1943, and the amended complaint was filed on September 22, 1943. (Tr. pages 1 to 8).

The Government in its brief gave no reason for delaying more than six years to file suit and only awakened to the question after suit had been filed by an informer.

D. *When an exception in an Act and the body of the act are in conflict the Exception prevails:*

Arnold v. U. S., 147 U.S. 174.
Hopkins v. U. S., 235 Fed. 95.
Hoover v. Intensity Radio, 286 Fed. 1003.

An exception exempts something absolutely from the operation of the statute:

Western Assurance Co. v. J. H. Mohlman, 83 F. 811.
Phipps v. Int. Rev. Com., 91 F. 2d 632, (Cert. denied, 168 U.S. 710).
Equitable Life Assn. Society v. Clements, 140 U.S. 226.
U .S. v. Morrow, 266 U.S. 531; 59 C.J. 1087 and 1092.

D. A proviso in a legislative enactment must be construed with the enacting clause and the entire statute construed with reference thereto.

Th office of a privisio is to be construed in connection with the enacting clause and its purposes is to restrict or modify the enacting clause:

U. S. v. Barnoys, 158 F. 782, 86 CCA 52.
Jones v. United States, 50 Ct. Claims 344.
United States v. Dickson, 15 Pet. 141, 10 L. Ed. 689.
Eagle Star v. Schlift, 24 F. 2nd 784.
Fed. Reserve Bank v. Walsh, 281 F. 579.
Balto. & O. R.R. Co. v. United States, 242 F. 420, 155 C.C.A. 196.
U. S. v. Morrow, 45 Sup. Ct. 173, 266 U.S. 531.
Cox v. Hart, 43 S. Ct. 154, 260 U.S. 427.
Foster v. Hart, 47 F. 2nd 892.
U. S. v. Mullender, 45 F. 2nd 78.
Deitch v. Staub, 115 F. 309, 53 CCA 137.
Merchants Nat. Bank v. U. S., 214 F. 2nd 200.
U. S. v. Lucas, 21 F. 2nd 550.
Sou. Tel & Tel. Co. v. Houston, 256 F. 690.

The point on which the Government relies on this appeal is conditional and the condition precludes the right of the Government to take over and prosecute the suit. It is clearly without force or effect in view of the conditions precedent, "*if* before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not therefore in the possession of the Department of Jus-

tice," which words are necessary to be construed with the words *"except as hereinafter provided."* (Clause B).

In the case of U. S. v. ex rel David Byarsky and David Byarsky v. George Brooks et al, 57 F. Sup 714, in the U. S. District Court, District Court of New Jersey, this court held squarely with the decision in the Sherr action, 57 F. Sup. 106. The court held that "reading into the statute the meaning urged upon me by the Government counsel could not, it seems to me, be in conformity with the purpose of the Amended Statute. The words *"any such suit"* must be given their literal meaning. They have reference to any suit instituted under the provisions of the statute. This court cited with approval the Sherr case, 57 Fed. Sup. 106, as follows:

> "The *words any such suit,* meaning a suit brought by an informer as well as for himself as the United States to recover penalties and damages for which a person who makes false claims against the Government is liable under R. S. Section 3490, 31 U.S. C.A. 231. Applying the above quoted provision of R. S. 3491 to the facts shown as to the source of the informer's information, I am obliged to conclude that this court has no jurisdiction to proceed with the *Sherr action.* Notice of appearance of the Attorney General in the Sherr action does not change the situation."

The right of the Attorney General to appear in a *qui tam* action under Subsection D, Public Law 213, does not have the effect of conferring jurisdiction on the court, "*if* under Subsection B, the action should be otherwise abated because it was based on information already in the possesion of the United States.

While the Sherr case and the Byarsky case were decided by courts inferior to this court, the decisions were sound and are highly persuasive.

Appellees contend that the legislative history shows conclusively that any suit brought under the amended statute,

Public Law 213, is a private suit and that the court had no jurisdiction to hear, try or determine such suit, if the informer had no information or evidence not theretofore possessed by the United States, or any officer, agent or employee thereof and that the dismissal of this suit based on said Public Law 213 was without error.*

E. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is untenable.

In that opinion the court said "as to first ground of the motion (meaning the motion to dismiss for lack of jurisdiction heard in the district court) clause D of the amended Act relates to suits under R. S. 3491 pending at its passage and provides that "the court in which said suit is pending shall stay all further proceedings and shall forthwith cause written notice, by registered mail, to give the Attorney General notice that such suit is pending and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit *in accordance with "C."* The opinion holds that this is the only notice necessary of a suit pending on December 23, 1943, and that the notice required by clause C to be given by the plaintiff on bringing a suit after that date is not necessary. We insist that the court was in error in such construction, particularly so, in view of the exception in clause (B) and in the specific provisions of clause (C), limiting the jurisdiction of the court. As we have heretofore argued, clause (D) cannot be construed independently of clause (C). The purpose of clause (D) was to give the Attorney General an opportunity to examine the facts and *if* informers had evidence or informa-

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*For the complete legislative history see the bound volumes of the Congressional Record, 78th Congress, 1st Session, Vol. 89, pages 194, 2277, 2450, 2800-1, 3099, 5459, 5871-2, 5873, 6548, 7325-7341, 7347, 7424-5, 7437-44, 7540-1, 7570, 7570-9, 7585, 7596-7617, 7792, 7805, 7806, 7821, 10311, 10696-10701, 10741-10752, 19824, 10844-9, 10950.

tion other than that possessed by the Government, or any officer or agent, and if so, the Attorney General could proceed on such information and evidence, *if* in his opinion, there was merit in the suit. The court further held that clause (C) regulates new suits.

On the question of jurisdiction, the court held that the Government might enter the suit at any stage of the proceeding and carry it on as if it had originally brought the suit. We insist, however, that unless the informer had complied with the provisions of the amended act, the court had no jurisdiction under clause (C). The court then speculates on different kinds of suits, which might have been brought; and further, that if the United States had instituted the suit for fraud it would not matter what the informer knew or disclosed; and that the United States would be entitled to prove fraud by others if it could. We insist that this is an untenable construction and we submit that the only condition under which the Government could take over the suit, was whether or not the informer had information and evidence not possessed by the Government or any officer, agent or employee thereof, and notified the Attorney General with request to sue.

And we further submit that the analysis of the bill by the Judiciary Committee clearly shows that the jurisdictional limitations of clause (C) apply and that if the informer had no information or evidence to support the suit, the *Government had the privilege of filing a new suit.* The opinion further states, "it seems wholly unreasonable to think Congress intended that after the Attorney General appears and takes over for the United States the prosecution of a fraud claim because he thinks the claim is a valid one, the United States should be cut off from a trial on the merits and the culprit should escape merely by proving that at the time suit was brought the relator knew no more than some government "agency, officer or employee" even though that

were enough to fully establish the claim. The intention was to discourage the carrying on of suits by undeserving relators; not to nullify the just claims of the United States, when the Attorney General takes over the case in behalf of the United States. This is a species of legislation by the Court. The courts are not concerned with results of legislation, but its function is to construe the legislation as adopted.

Hess v. U. S., 317 U.S. 537.
U. S. v. Cooper Corporation, 312 U.S. 600.

This Court does not legislate. It must be presumed that if the Congress had intended thus to limit and restrict the force of the words limiting the jurisdiction of this Court that it would have said so in plain and unmistakable language.

The case of *United States v. Baker-Lockwood Manufacturing Co.*, 138 F. (2d) 48 (cited by the Government, Brief p. 26), decided by the Eighth Circuit, September 29, 1943. Public Law 213 was adopted December 23, 1943. Thereafter, the Supreme Court granted certiorari; set aside the judgment of the Eighth Circuit and remanded the cause to the District Court with directions to proceed in conformity with Public Law 213. *Nathanson v. United States*, 321 U.S. 744, 64 S. Ct. 522.

The language of clause (C) dealing with the jurisdiction of the Court applies to all private suits whether being carried on by a private person or by the Government. The Government contended below that the word "such" in the language "The court shall have no jurisdiction to proceed with any such suit" must be held to refer only to suits instituted by a private person and carried on by the private person.

The Government's claim concerning what the Congress intended was flatly and conclusively refuted by the language

of the Conference Report, 78th Congress, First Session of the House of Representatives, Report No. 933, page 6, paragraph just below the middle of the page:

> "Jurisdiction is denied to the court to proceed with any suit brought under clause (B) or pending suit brought under Section 3491 of the Revised Statutes (private suits) whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.
>
> "It will not be possible to abate a pending suit if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

It will be observed that the report omitted the word "such" without any change in the meaning of the language so that plainly jurisdiction is denied to the Court to proceed with any private suit instituted under clause (B) or pending suit brought under the old statute without regard to whether the Government has taken it over or not if at the time it was instituted it did not meet the statutory test of jurisdiction.

The Government's argument, in its Brief, is one which goes to the wisdom or lack of wisdom of the legislation. Senator Danaher, a member of the Judiciary Committee, pointed out to the Senate in the course of the debates, Vol. 89, Congressional Record, page 7574, that

> "A premilinary inquiry will certainly become necessary in any case when challenge is offered to the jurisdiction, to determine, first, whether or not the information in fact is original with the suitor, the plaintiff, and second, whether or not it is information which has not previously been obtained by the United States itself through a public investigation."

The language of the statute is plain and unambiguous and there is no room for judicial construction.

By the plain language of the statute jurisdiction is withheld in any pending suit instituted by a private person when it appears that at the time the suit was begun he had no evidence or information in his possession which was not already in the possession of the Government. By the plain language of the statute the pending suits which the Government is authorized to take over and carry on of which the Court will get jurisdiction are cases which satisfy the jurisdictional test, that is, cases in which the private suitor was in possession of the evidence or information not in the possession of the Government at the time when the suit was brought or if in the possession of the Government at that time it was communicated to the Government by the private suitor before he began his suit.

Judicial construction may not be substituted for legislation. *United States v. Missouri Pacific R. Co.,* 278 U. S. 269, 49 S. Ct. 133, 73 L. Ed. 322; *United States v. Wiltberger,* 5 Wheat. 76, 95, 96, 5 L. Ed. 37; *United States v. Fisher,* 2 Cranch, 358, 386, 2 L. Ed. 304; *Lake County v. Rollins,* 130 U. S. 662, 670, 9 S. Ct. 651, 32 L. Ed. 1060; *Caminetti v. United States,* 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168; *Ex parte Public National Bank,* 278 U. S. 101, 49 S. Ct. 43, 73 L. Ed. 202; *United States v. Colorado and N. W. R. Co.* (C.C.A.) 157 F. 321, 15 L.R.A. (N.S.) 167, 13 Ann. Cas. 893.

It is not within the judicial province to read out of the statute the requirement of its words. *United States v. Felt and Tarrant Mfg. Co.,* 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025; *Rand v. United States,* 249 U. S. 503, 510, 39 S. Ct. 359, 63 L. Ed. 731.

The intention of the Congress is to be sought for primarily in the language used, where this expresses an intention

reasonably intelligible, and without modification by resort to construction or conjecture. *Thompson v. United States,* 246 U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; *Gardner v. Collins,* 2 Pet. 58, 93, 7 L. Ed. 347, 359; *United States v. Goldenberg,* 168 U.S. 95, 102, 18 S. Ct. 342 L. Ed. 394, 398.

Ordinarily no court can disregard statutory provisions on the ground that, in its judgment, they were unwise or prejudicial to the interests of the public. *Chapman v. Wintroath,* 252 U. S. 126, 40 S. Ct. 234, 64 L. Ed. 491; *United States v. American Bell Teleph. Co.,* 167 U. S. 224, 246, 17 S. Ct. 809, 42 L. Ed. 144, 155.

The province of construction lies wholly within the domain of ambiguity. *George Van Camp and Sons Co. v. American Can Co.,* 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311; *Hamilton v. Rathbone,* 175 U.S. 414, 419, 421, 20 S. Ct. 155, 158, 44 L. Ed. 219.

If the plain words of the statute leave no room for construction, the courts have no choice but to follow without regard to the consequences. *Commissioner of Immigration of Port of New York v. Gottlieb, et al.,* 265 U. S. 310, 44 S. Ct. 528, 68 L. Ed. 1031; *Chung Fook v. White,* 264 U. S. 443, 44 S. Ct. 361, 68 L. Ed. 781; *Zartarian v. Billings,* 204 U. S. 170, 27 S. Ct. 182, 51 L. Ed. 428; *Low Wah Suey v. Backus,* 225 U. S. 460, 476, 32 S. Ct. 734, 56 L. Ed. 1165.

Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place except in the domain of ambiguity. *Russell Motor Car Co., v. United States,* 261 U. S. 514, 43 S. Ct. 428, 67 L. Ed. 778; *Hamilton v. Rathbone,* 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. Ed. 219, 222; *United States v. Barnes,* 222 U. S. 513, 518, 519, 32 S. Ct. 117, 56 L. Ed. 291-293.

They may not be used to create, but only to remove, doubt. *Russell Motor Car Co. v. United States, supra.*

The plain language of the statute is consistent with the legislative purpose.

The primary purpose of the legislation as finally adopted was the elimination of the practice (which had become a national scandal) of unprincipled adventurers—unfortunately in the main part lawyers, instituting suits under the statute where the sole contribution consisted of copying the information contained in criminal indictments into a civil complaint. The distinguished chairman of the Senate Judiciary Committee, the late Senator Van Nuys of Indiana, repeatedly told the Senate:

> "In this day of rackets these informer suits represent the world (worst?) form of racketeering today existing in the United States of America." 89 Congressional Record, June 15, 1943, page 5961.

Also that the total of the demands in the pending suits was $69,000,000 so that the racketeers were working toward a potential pot of $35,000,000.

On September 15, Congressional Record, 7653, the chairman of the Senate Judiciary Committee again reviewing the legislation said that:

> "Since the recess of Congress, seven additional suits have been filed, making the total demands at this time by the informer suits $144,000,000, one-half of which, or $72,000,000, would go, if the evidence sustained it, to the informers. That is the potential pot that the informers and their racketeering lawyers are thrusting upon the Department of Justice and the people of the United States.
>
> "One suit by reason of alleged false claims recently filed against the Union Oil Co. and the Union Pacific Railroad totals $1,200,000,000. Senators can see what such suits do to companies in the way of expense. Many of the companies are engaged in war production. Senators can understand what that does to the Department of Justice, because the Attorney General has no right to

appear and conduct the suits. He is not even informed of them when they are filed, except in some instances the court immediately notifies him. That gives an idea, let me say to the Senator from Tennessee, as to the extent of the practice."

The same Senator, September 17, 1943, Volume 89, page 7690:

"The bill is designed to prevent fraud upon the part of the racketeering informers and their lawyers, running into millions of dollars at this time."

In the House the bill adopted was an outright repeal which would have eliminated informers' suit and the limitation section. The sole reason advanced by the representative in charge of the bill (Mr. Walter) is summarized in one of his sentences:

"It has become a racket and it seems to me that the quicker we eliminate the possibility of harassing people by those who have not contributed one iota to the disclosure, the better off the Nation will be." 89 Congressional Record 2800-2801.

On pages 42, 43, 44 and 45 of Appellant's Brief there is copied the original version of the Senate Bill. Thereafter, the bill was amended in a number of respects, and finally it was substantially rewritten by the managers of both Houses in Conference, and then approved by both Houses.

The conceded facts in this case bring them directly within this specific legislative purpose; to outlaw cases where the language of the criminal indictment was copied into the civil complaint.

Other reasons were advanced for the adoption of the legislation. They played but a minor role. Certainly, the courts had adequate power without additional legislation to protect the Government from disclosures in a civil suit

which would prejudice it in a pending criminal proceeding. Then, too, it was suggested that the defendants might cause an informer's suit to be instituted and to be conducted and managed in their interest. This suggestion fails to take into consideration the stern and forbidding reality that such a course might lead to a criminal indictment for conspiracy under Title 18, U.S.C., Section 88.

The claim of the Government that the "chief objective" of Public Law 213 was to give the Attorney General "full" control of all proceedings under the false claim statute and thereby to modernize and make more efficient the enforcement of the civil and criminal remedies created by that statute rests upon nothing more substantial than mere assertion.

In *United States v. Hess,* 317 U. S. 537, 63 S. Ct. 379, at page 385, Mr. Justice Black speaking for the Supreme Court said:

> "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General*; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigation; and finally that conditions have changed since the act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not."

89 Congressional Record 7678:

> "Mr. Rovencomb. * * * The Department of Justice came before the Judiciary Committee and wanted that

*In a footnote the Court points out that the Department of Justice desired to control the institution of these actions; had it already had control over their settlement.

law repealed. A majority of the committee decided not to repeal the law, but has reported to the Senate a bill which, in substance, provides that before any individual may bring such a suit upon information of fraud in the case of a Government contract he must submit to the Attorney General of the United States the information upon which he would act, and the Attorney General may then institute the suit or may refuse to do so. If, in his wisdom, he does not think the suit should be brought or if 6 months elapse after notice has been given by the informer *without suit being brought by the Attorney General,* then the informer may bring suit. That, in substance is the measure as reported to the Senate after being changed by the Judiciary Committee." (Italics supplied).

It thus appears that the draft of the Bill desired by the Department of Justice was not enacted. A mere reading of the statute should satisfy anyone that the statute does not give the Atorney General "full control of all procedings under the false claim statute," but on the contrary it places the private person who is a *bona fide* informer and not a racketeer in a position where he may decide whether suit shall be instituted and may spur and stimulate the Attorney General into action after the suit is instituted and if the Attorney General does not act, the informer is put in a position where he may himself carry on without any control from the Department of Justice except to approve a settlement. As was repeatedly said in the debates, the Congress insisted upon protecting the honest informer.

The further claim is made that Public Law 213 is a mere procedural statute. The statute is one plainly designed to deprive the Court of jurisdiction of a racketeering law suit, that is, one brought by someone who has not given the Government any information but has copied the Government's information into a civil complaint.

As the Court below concluded the manifest purpose of Congress in amending the informer statute was to bring to

an end the practice of filing suits of persons who had no information or facts of their own but copied the allegations of a criminal indictment into a civil complaint merely changing the title and adding the prayers.

The argument that even though the literal language of Public Law 213 supports the interpretation of the Court below that such interpretation cannot stand is based upon the assumption that the Court's interpretation of the language produces an unreasonable result in variance with the purpose and policy of Public Law 213. We have already pointed out that the Government's claim in this regard is nothing more than mere assertion. The literal language of the statute is wholly consistent with and in harmony with the intention of the Congress as we have adequately demonstrated heretofore in this brief. The cases cited by the Government therefore are without application.

In the case of U. S. v. Cooper Corporation, 312 U.S. 600. In the opinion written by Justice Roberts this court held that:

"Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But *it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.*"

The Pedro, 175 U.S. 354, 364, 20 S. Ct. 138, 141, 44 L. Ed. 195.

Dewey v. United States, 178 U.S. 510, 519, 520, 20 S. Ct. 984, 44 L. Ed. 1170.

Pirie v. Chicago T. & T. Co., 182 U.S. 438, 451, 21 S. Ct. 906, 911, 45 L. Ed. 1171.

White v. United States, 191 U.S. 545, 551, 552, 24 S. Ct. 171, 172, 48 L. Ed. 295.

Elbert v. Poston, 266 U.S. 548, 554, 45 S. Ct. 188, 190, 69 L. Ed. 435.

Helvering v. Oregon L. I. Co., 311 U.S. 267, 272, 61 S. Ct. 207, 209, 85 L. Ed. 180.

In this case the Court further said:

"The recent expressions of this Court in Tigner v. Texas, 310 U.S. 141, 148, 149, 60 S. Ct. 879, 882, 883, 84 L. Ed. 1124, 130 A.L.R. 1321, warn that it is not for the courts to indulge in the business of policy making in the field of anti-trust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress."

Davis v. Pringle, 268 U.S. 315, 318, 45 S. Ct. 549, 550, 69 L. Ed. 794."

CONCLUSION

We submit that we have demonstrated that the decision of the Circuit Court of Appeals is an untenable construction of an important Federal Statute in that it held:

> The order of the District Court dismissing the action was incorrect.
>
> The Government contends, (Br. 11), that when a qui tam action is taken over by the United States its ceases to be a private suit and becomes a public suit. (Br. 11). We urgently insist this is not so, but is controlled by the exception in clause B and the jurisdictional limitations as provided in clause C.
>
> The Government further contends that the jurisdictional limitations contained in clause C of Public Law 213 apply only to qui tam suits brought by informers. This contention is based on nothing more than a bare assertion.
>
> Petitioners maintain that the decisive test of jurisdiction in this suit and in any suit instituted by a private person is whether, when the suit was brought it was based upon evidence or information already in the possession of the Government and no other. If it was, *we insist* that the Court had no jurisdiction:

We have demonstrated that a complaint brought by a private informer who had no information or evidence other than that already possessed by the Government, of any officer, agent or employee thereof, at the time the suit was brought; and that he did not serve a copy of the complaint on the United States District Attorney and forwarded a copy of same to the Attorney General of the United States, deprives the court of jurisdiction under clauses B and C of Public Law 213.

We further submit that the Court of Appeals of the Fifth Circuit misconstrued the force and effect of Public Law 213, in that it based its decision not on the point designated

by the Government on appeal, of which it relied, and further, the Court based its decision on other provisions of the statute without regard to the provisions of clauses B and C. (Exhibit C).

We further submit, that, we have demonstrated that the intention of Congress was to deprive the Court of jurisdiction in a suit brought by a private informer, who did not have information or evidence other than that possessed by the Government at the time the suit was brought.

We further submit, that the decision of the Fifth Circuit of Appeals goes far afield in its construction and engaged in speculative and legislative questions, contrary to numerous decisions of this Court.

We, therefore, urge that the reversal by the United States Circuit Court of Appeals for the Fifth Circuit in this cause should be reversed and set aside; that the order of the District Court dismissing the action should be affirmed, and that the mandate of the Circuit Court of Appeals should be quashed and held for naught.

Respectfully submitted,

JESSE KILGORE BROCKMAN,
Attorney for John B. Pittman, Joseph L. Garvey and J. D. Pittman Tractor Co., Inc., Petitioner, Appellees in the Court below.

Of Counsel.

AFFIDAVIT

THE STATE OF ALABAMA)
JEFFERSON COUNTY) ss

Jesse Kilgore Brockman, being first duly sworn, deposes and says that he is the attorney for the petitioners above named; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

Subscribed and sworn to before me, this ..... day of March, 1946.

Notary Public.

CERTIFICATE OF SERVICE

THE STATE OF ALABAMA)
JEFFERSON COUNTY) ss

I, Jesse Kilgore Brockman, Attorney-at-Law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for Writ of Certiorari; that the same is not made for delay, and that in my opinion said petition is meritorious and well founded in law and ought to be granted and the Writ issued.

I further certify that I have personally given notice of the filing of the petition, together with a copy of the petition, supporting brief, and printed record by serving copies on Hon. ....., Solicitor General of the United States, Washington, D. C., and the Hon. John D. Hill, District Attorney for the Northern District of the Southern Division of Alabama, Birmingham, Alabama.

SUPREME COURT OF THE UNITED STATES

_____ Term, 194____

No._____

John D. Pittman, Joseph L. Garvey and J. D. Pittman Tractor Company, Inc., a corporation,

Petitioners

vs.

United States of America

To Solicitor General of the United States, Washington, D. C. and John D. Hill, District Attorney, Birmingham, Alabama. Counsel for Respondent.

You are hereby notified that a petition, for a writ of certioriari in the above entitled cause was filed in the Supreme Court of the United States on the _____ day of _____, 1946.

A printed copy of the record and a printed copy of the petition and brief are served upon you herewith.

_____

Petitioners.
Attorney for John D. Pittman, Joseph L. Garvey and J. D. Pittman Tractor Company, Inc.

Service accepted this _____ day of _____, 1946.

_____

Counsel for Respondent.

EXHIBIT A

PUBLIC LAW 213, 78TH CONGRESS, CHAPTER 377, FIRST SESSION—H.R. 1203
AN ACT

To limit private suits for penalties and damages arising out of frauds against the United States.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled. That Section 3491 of the Revised Statutes (U.S.C., Title 31, Sec. 232) be, and it hereby is, amended to read as follows:

"Section 3491 (A). The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try and determine such suit.

"(B) *Except as hereinafter provided, such suit* may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reason for such consent.

"(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information

in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after *service as above* provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: PROVIDED, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. *The court shall have no jurisdiction to proceed with any such suit brought under clause (B)or pending suit brought under Sec-3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought:* PROVIDED, however, that no abatement shall be had as to a suit pending at the effective date of this Act *if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.*

"(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, Section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on *such suit in accordance with clause (C).*

"(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the

person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

"(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: PROVIDED, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

"Sec. 2. Section 3493 of the Revised Statutes (U.S.C., Title 31, Sec. 234) is hereby repealed. (Italics supplied).

EXHIBIT B

ANAYLSIS OF THE BILL

The Bill amends Section 3491 of the Revised Statutes (U.S.C., Title 31, Section 232) and as amended, provides that:

"Such suits may be brought and carried on by any person, for himself and the United States, but shall not be withdrawn without the consent in writing of the judge of the court and the district attorney: PROVIDED, That no district court of the United States shall have jurisdiction to hear, try or determine any such suit, *unless based upon information, evidence and source original with such person and not in possession of or obtained by the United States in the course of an investigation or proceeding by it, unless prior to commencement thereof (1) such person has made full disclosure in writing to the Attorney General of the grounds thereof and has requested the Attorney General to cause such suit to be brought;* and (2) the Attorney General has, after receipt of such disclosure and request, declined in writing to comply with such request, or has allowed six months to elapse after receipt of such disclosure and request, *without causing a suit to be brought:* PROVIDED further, that in the event the Attorney General takes action following receipt of such disclosure and request, the court may award to such person out of the proceeds an amount fair and reasonable, which amount shall in no event exceed one-tenth of such proceeds. * * *

PROVIDED, That the court in which suit is pending shall stay further proceedings until the Attorney General shall have thirty days' opportunity to move and shall give notice to the Attorney General; and that the provisions preceding this proviso shall not be applicable to any such pending suit unless the Attorney General shall have within thirty days after receipt of such written notice, moved the court to *dismiss the suit.* Provided further, that if after dismissal under this act of any such pending

suit a person having brought such suit makes full disclosure and request, as amended by Section _____ of the Act, and the Attorney General declines in writing to comply with such request, or allows six months to elapse *without causing suit to be brought,* such person may bring and carry on a *new suit* based on the same act, acts and transaction. If the previous suit by such person was timely, the time within which such *new suit* may be recommended by such person shall not expire until eight months after the date of the enactment of this Act, or until the expiration of the time provided by Section 3491 of the Revised Statutes, whichever is later: PROVIDED further, that the Attorney General may cause a *new suit* to be brought based in whole or in part upon the act, acts, or transactions involved in such pending suit previously brought, if the previous suit brought by such person was timely, the period within which the Attorney General may cause a suit to be brought shall not expire until eight months after the enactment of this Act, or until the expiration of the time provided by Section 3491, whichever is later.

By Section 3 of the Bill, it is provided that nothing in the act shall affect any such suit which was filed prior to June 15, 1942, or in which a final judgment has heretofore been entered." (Italics supplied).

EXHIBIT C

In The

UNITED STATES CIRCUIT COURT OF APPEALS
For The Fifth Circuit
No. 11395

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN D. PITTMAN, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.
(November 6, 1945)

Before SIBLEY and McCORD, Circuit Judges, and KENNAMER, District Judge.

SIBLEY, Circuit Judge: A *qui tam* suit under R. S. §3491, 31 U.S.C.A. §232 was brought on August 5, 1943, by Charles M. Hewitt as relator in the name of the United States against the appellees. After R.S. 3491 was amended by the Act of December 23, 1943, 57 Stats. 608, and under the provisions of the amendment, the United States appeared in the suit and asserted a purpose to carry it on. The defendants-appellees moved to dismiss the suit (1) because the plaintiff Hewitt had not given notice to the Attorney General of the pendency of the suit as required by the Act, and (2) because the plaintiff had not disclosed to the United States or the Attorney General any information or evidence not already possessed, the court therefore having no jurisdiction under the Act. The district court dismiss-

ed the suit for want of jurisdiction, apparently on the second ground. The United States appeals.

As to the first ground of the motion, clause D of the amending Act relates to suits under R. S. 3491 pending at its passage, and provides that "the court in which said suit is pending shall stay all further proceedings and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause C." This notice given by the court is, we think, the only notice necessary of a suit pending on December 23, 1943. The notice required by clause C to be given by the plaintiff on bringing a suit after that date is not necessary. The notice given here seems to have been that ordered by the court on suspending proceedings under clause D. If any other or more formal notice was required than was given its only purpose was to cause an appearance by the United States within sixty days, and that was accomplished in this case. The general appearance of the United States waived any defect in the notice given, just as such appearance by a defendant in an ordinary suit waives defects in process or the service thereof. The appellees were prejudiced in no manner.

The second ground of the motion presents greater difficulty. Clause D as above quoted indicates that the pending suits to which it applies are, after notice to the Attorney General, to be carried on in accordance with clause C which regulates new suits. Clause C states: "If the United States shall fail or decline in writing to the court during said period of sixty days (after notice) to enter any such suit, such person (i. e. the relator) may carry on such suit If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States

shall not be bound by any action taken by the person who brought it, and may *proceed in all respects as if it were instituting the suit:* Provided, that if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be be carried on by the person bringing the same in accordance with clause (B) above. *The Court shall have no jurisdiction to proceed with any such suit* brought under clause (B) *or pending* suit brought under Section 3491 of the Revised Statutes *whenever it shall be made to appear* that such suit was based upon *evidence or information* in the possession of the United States or *any agency, officer or employee thereof* at the time such suit was brought: Provided, however, that no abatement shall be had as to a *suit pending at the effective date* of this Act *if* before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice." (Italics added). Clause (E) then provides for rewarding the relator for such disclosure in a suit taken over by the United States and successfully carried on or settled, in an amount fixed by the court not exceeding one-tenth of the proceeds; or an award of not exceeding one-fourth of the proceeds when not carried on by the United States, but by the relator.

The persons here sued proved by the relator and his attorney that when the latter brought this suit they had no information not in the possession of the United States and disclosed none to the Attorney General, but based the complaint on a federal indictment returned against the defendants and on nothing else. The district court thought the words of clause C denying jurisdiction to proceed under such circumstances were intended to apply not only to

suits carried on by the relator, but also to those taken over and carried on by the United States, and required dismissal, although it appears that a new suit by the United States for the frauds here charged would now be barred by the six-year limitation fixed by R. S. §3494. It is argued that such is the unambiguous purport of the words above quoted, and no different intent ought to be considered.

Congress, however, did not say "*any* suit brought under clause (B) or Revised Statutes Section 3491," but "any *such* suit" so brought. We cannot throw away the word "such." It is descriptive and limiting, referring always to a class just before pointed out. Now several sorts of suits brought under clause B or R. S. §3491 had just been mentioned in clause C: Those in which the United States appeared; those in which it neglected or declined to appear; and those in which the United States having appeared failed to prosecute in six months. Is it certain that all three of these classes are clearly meant? To include the class of *qui tam* suits taken over and diligently prosecuted by the United States would collide with the broad provision just preceding that "the United States shall not be bound by any action taken by the person who brought it; and may proceed in all respects as if it were instituting the suit." If the United States had instituted suit for the fraud it would not matter what Hewitt knew or disclosed, but the United States would be entitled to prove the fraud by others if it could. We cannot believe the Congress intended that the United States should have no redress for such frauds merely because some relator had sued in its name without having possessed or disclosed original evidence or information. We would think Congress said so in plain words rather that the provisions of the Act taken together mean that when a relator starts such a suit the Attorney General shall be notified and the United States as against the defendants has the right to adopt as its own what was from the first

claimed in its name, unprejudiced by anything the relator may have done or omitted to do; but as respects the relator the United States must reward him out of the proceeds if he has really contributed original information in bringing the suit. It is when the United States fails to adopt or prosecute the suit, and the relator carries it on, that the defendants may raise an issue with the relator as to the merit of his activity in bringing it, and on this collateral issue may defeat it utterly.

The legislative history of the Act supports this view. The old law permitted suit by any private person, even though he acted only on evidence in the possession of the United States. *United States v. Hess,* 317 U.S. 537. A concurrent suit might also be brought by the United States, causing a conflict of suits. *United States v. Baker-Lockwood Mfg. Co.,* 138 Fed. (2) 48. The Attorney General pointed out the resulting evils and asked repeal of the provision authorizing suit by private relators. The House of Representatives passed such a Bill. The Senate substituted a Bill which retained but undertook to limit the private suits, but only if based on information and evidence original with the relator and disclosed beforehand to the Attorney General with a refusal by him to sue; but if the Attorney General should sue and succeed, the relator to be rewarded from the proceeds by a sum not to exceed one-tenth. As to pending suits, they were to be stayed, the Attorney General notified, and he might move to dismiss the suit, but after relator disclosed original evidence without action by the Attorney General, the relator might bring a new suit. This Bill expressly provided that the Attorney General might bring suit himself based in whole or in part upon the information and evidence disclosed, and if the relator's suit was timely, that brought by the Attorney General would not be barred by limitation if filed within eight months. The conflicting bills went to a Conference Committee which

wrote the act of December 23, 1943, passed by both houses. This Act follows most of the ideas of the Senate Bill, with two broad differences: The relator's suit is not to be dismissed and a new one filed when the Attorney General elects to carry on, but it is to be carried on by the United States "in all respects as if it were instituting the suit;" and the provision extending the period of limitation was dropped because, since the same suit is thus to be carried on, such a provision was not needed for the protection of the United States. The Senate bill denied jurisdiction to the court to hear or try "such suit brought or carried on by any person for himself and the United States" unless based on original evidence and information not in possession of the United States, and also denied jurisdiction to hear or try any suit then pending brought "by any person for himself and the United States" as to which there would not be jurisdiction if brought afterward. These provisions of the Senate Bill clearly applied only to a suit carried on by the informer, and not to the new suit the Attorney General might bring. We think the same purpose pervades the cognate provision of the Act as passed, and the denial of jurisdiction under the stated circumstances is intended to apply only to suits carried on by the relator, and not to those taken over (instead of bringing a new suit) by the United States. It seems wholly unreasonable to think that Congress intended that after the Attorney General appears and takes over for the United States the prosecution of a fraud claim because he thinks the claim a valid one, the United States should be cut off from a trial on the merits and the culprit should escape merely by proving that at the time the suit was brought the relator knew no more than some government "agency, officer or employee" knew, even though that were enough to fully establish the claim. The intention was to discourage the carrying on of suits by undeserving relators; not to nullify the just claims of the

United States when the Attorney General takes over the case in behalf of the United States.

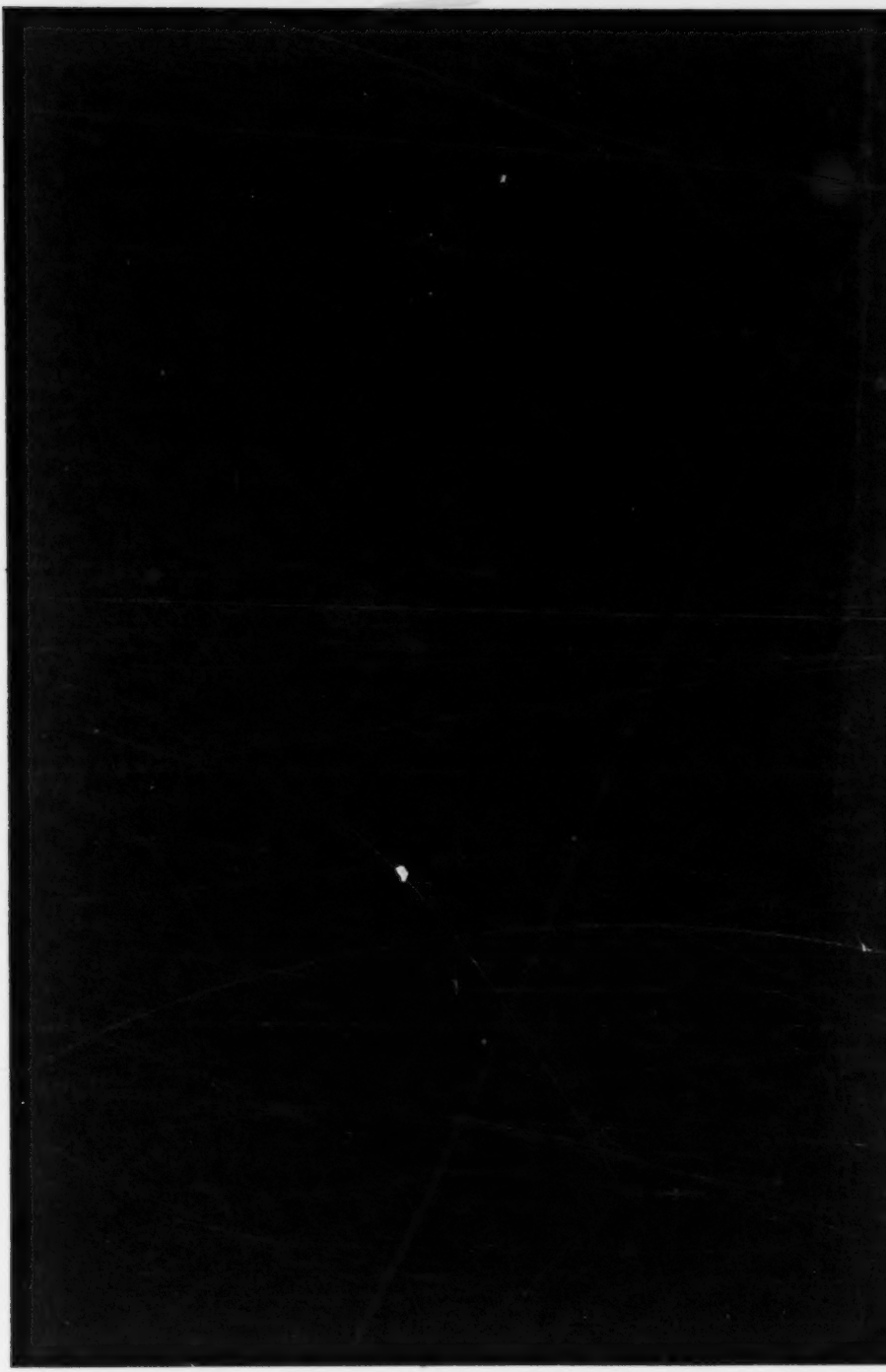
The judgment of dismissal is reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A True copy:
Teste:

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

By _____
Deputy Clerk.



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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1035

JOHN D. PITTMAN, JOSEPH L. GARVEY, AND J. D. PITTMAN TRACTOR CO., INC., A CORPORATION, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern Division of the Northern District of Alabama did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 39–44) is reported at 151 F. 2d 851.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 6, 1945 (R. 44). A

petition for rehearing was filed by the petitioners on November 20, 1945, and was denied by the court below on January 7, 1946 (R. 48). The petition for a writ of certiorari was filed on April 1, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

This action was originally commenced against petitioners by a *qui tam* plaintiff under the provisions of Sections 3490–3493 and 5438 of the Revised Statutes prior to the Act of December 23, 1943 (57 Stat. 608).

The question presented is whether the United States, by virtue of its entry of appearance in the action pursuant to clause (D) of the Act of December 23, 1943, may continue to prosecute the action to final judgment, or whether the court is deprived of jurisdiction, notwithstanding the entry of appearance by the United States, because the information upon which the action was based was in the possession of the United States prior to the commencement of the action by the *qui tam* plaintiff.

STATUTES INVOLVED

Rev. Stat. §§ 3490–3493 and 5438, as they read prior to the Act of December 23, 1943 (57 Stat. 608), and the provisions of that Act are set forth in Appendices A and B, pp. 15–22, *infra*.

STATEMENT

On August 5, 1943, Charles M. Hewitt, a private individual, commenced a *qui tam* action against petitioners in the United States District Court for the Southern Division of the Northern District of Alabama to recover damages and forfeitures under Rev. Stat. §§ 3490 and 5438 for the commission by petitioners of certain frauds upon the United States (R. 1–5).[1] Hewitt has since stated by affidavit (R. 30) that his action was based entirely upon facts, of which he had no prior knowledge, taken from an indictment previously returned against petitioners by a Federal Grand Jury.

On December 23, 1943, Rev. Stat. § 3491 was amended to provide, *inter alia,* that within sixty

[1] Rev. Stat. § 5438 prohibits, under penalty of fine and imprisonment, the making of a false claim against the Government of the United States or otherwise defrauding or attempting to defraud it. Rev. Stat. § 3490 provides that any person who commits such an act "shall forfeit and pay to the United States" $2,000 plus "double the amount of damages" sustained by the United States, with costs, all to be sued for in the same suit. By Rev. Stat. § 3491 as in effect prior to December 23, 1943, "Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States * * *." Rev. Stat. § 3493 prior to December 23, 1943, provided that "The person bringing said suit and prosecuting it to final judgment shall be entitled to receive" one-half the forfeiture and damages "he shall recover and collect," the other half "shall belong to and be paid over to the United States * * *." (See Appendix A, pp. 15–18, *infra.*)

days after notice to the United States of the pendency of any *qui tam* suit brought thereunder before or after the amendatory act, the United States may enter its appearance therein and carry on the suit (57 Stat. 608–609; § 3491 (D)).[2] Clause (C) of the amendatory act provides in part as follows:

> * * * If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with

[2] The 1943 amendment also repealed Rev. Stat. § 3493 and provided that if the United States carries on the suit, the court "may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought", but not more than 1/10 of the proceeds or settlement (§ 3491 (E) (1)). If the suit is not carried on by the United States, the court may award an amount, not more than ¼ of the proceeds or settlement, "which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages" (§ 3491 (E) (2)).

due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

On January 13, 1944, the district court ordered a stay in the proceedings for the sixty-day period required by clause (D) and caused notice to be served of the pendency of the action upon the Attorney General (R. 20). On March 10, 1944, the United States duly entered its appearance in the proceeding (R. 21, 22). On August 29, 1944, petitioners, defendants to the action, moved for its dismissal (R. 22–23). On March 29, 1945, Hewitt's affidavit that the action was based solely

upon facts obtained from a Federal indictment was filed in the district court. On April 11, 1945, the district court entered a decree of dismissal of the complaint (R. 31–33) on the ground that it was "without jurisdiction to proceed in the cause."

Upon appeal by the United States (R. 33), the court below reversed the ruling of the district court (R. 44), holding in its opinion (R. 39–44) that under a proper construction of the amendatory act: "It is [only] when the United States fails to adopt or prosecute the suit, and the relator carries it on, that the defendants may raise an issue with the relator as to the merit of his activity in bringing it, and on this collateral issue may defeat it utterly" (R. 42).

ARGUMENT

The sole question presented—whether the United States, after taking over a *qui tam* action not commenced on original information, may proceed against the defendants on the merits—has been affirmatively answered both by the court below and more recently by the Circuit Court of Appeals for the Third Circuit in *United States ex rel Bayarsky* v. *Brooks,* No. 8933, decided March 7, 1946.[3] These holdings are consistent with the statute and with the legislative intent. Further-

[3] Accordingly, petitioners' reliance upon the district court opinion in the *Bayarsky* case (Pet. 19) is misplaced.

more, the judgment below is not dispositive of the entire controversy since it in no way represents an adjudication of the defendants' liability on the merits. Accordingly, we submit that review by this court is unwarranted.

Petitioners' contention that the action is not maintainable by the United States is based upon the language appearing in clause (C) of the amendatory act that: "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought * * *." Petitioners' reliance upon this provision to defeat the action after the United States has entered its appearance for the purpose of carrying it on ignores both the preceding language of the amendatory act and the legislative purpose in enacting it.

1. Clause (B) reads in part: "(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States * * *." Clause (C) governs appearances by the United States both in *qui tam* actions brought under (B) after the passage of the amendatory act and (by virtue of clause (D)) in suits pending at the time of its en-

actment. With respect to both classes of suit clause (C) in pertinent part reads:

> If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: * * *.

Then follows a proviso clause, stipulating for a reversion of the action to the *qui tam* plaintiff in the event the United States after taking over the suit fails to carry it on "with due diligence." We submit that the court below properly viewed the jurisdictional limitation expressed in the sentence following this proviso as applying only where the United States has (a) failed or refused to enter an appearance within the sixty-day period or, (b), allowed the suit to revert to the *qui tam* plaintiff through inaction. As the court below noted (R. 42), the first reference in the jurisdictional limitation in (C) is to "any such suit brought under clause (B)." The use of the term "such suit" requires a reference to the immediately preceding language of the clause which deals with suits not only commenced under (B) but also being "carried on by the person bringing the same in accordance with clause (B) above."

Ultimately the term may be referred back to clause (B) which states that "Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States * * *." See also the language in (C) that: "If the United States shall fail, or decline in writing * * * to enter any such suit, such person may carry on such suit." The limitation is plainly upon the "carrying on" by a *qui tam* plaintiff of a suit commenced by him without original information, but, we submit, has no application to the carrying on of such an action by the United States upon entry of its appearance. A holding otherwise would fail to give effect to the provision in (C) that where the United States does enter its appearance in such an action it "* * * may proceed in all respects as if it were instituting the suit." It is obviously not an infirmity to the carrying on of a suit by the United States that its officers or agents had knowledge of the facts upon which the cause of action is based prior to the institution of the proceeding.

Since it can hardly be presumed that the Congress intended a different rule to apply to suits pending at the time of the passage of the amendatory act, the conclusion above reached that a non-informing *qui tam* suit brought under (B) after the passage of the amendatory act is not subject to abatement when being carried on by the United States would seem to foreclose petitioners'

contention with reference to the present t action. This conclusion, moreover, is independentl tly reinforced by an examination of clause (D) whi nich provides for the appearance of the United St States in such pending actions. That clause in releva ant part reads "* * * and the Attorney Gener ral shall have sixty days from the date of such n notice to appear and carry on such suit in acc cordance with clause (C)." The only provision in (C) relative to carrying on such suits is that t quoted above, *viz.* that "In carrying on such suit the e United States * * * may proceed in all resp spects as if it were instituting the suit." No pr provision is made in (D) that the "carrying on" of f the suit by the United States shall also be subject ct to the jurisdictional limitation expressed in (C). Since the jurisdictional provision is antithetical al to the permission granted the Attorney General l in (D) "to appear and carry on such suit * * *," it is submitted that the absence of reference e in (D) to the jurisdictional limitation prevents its its application to pending suits in which the United States has entered an appearance.

2. Prior to the passage of the amenda atory act it was not a defense to a *qui tam* action un nder Rev. Stat. §§ 3490–3493 that the private plaintiff ff had not contributed to the discovery of the frauds ls alleged. *United States ex rel. Marcus* v. *Hess*, 317 U U. S. 537. Such a suit, although not in any way bas ased upon original information, subserved the pur rposes of the statute by obtaining for the United S States, in

cases of governmental inaction, at least one-half of the restitution to which the Government was entitled. *Ibid.* at 545, 547–548, 551–552. But private persons rapidly developed the practice during the recent war period of filing *qui tam* actions immediately upon the release of information concerning the return of criminal indictments, Congressional investigations, and the like, where the facts made public indicated that possible causes of action existed under the provisions of Rev. Stat. §§ 3490–3493 and 5438. See S. Rep. No. 291, 78th Cong., 1st Sess., p. 2. These actions were hastily filed in an effort to pre-empt the field not only against other *qui tam* plaintiffs but against the Government itself.[4] The resulting situations seriously jeopardized the Government's criminal proceedings and led the Department of Justice to recommend amendatory legislation. Its reasons are succinctly stated in the Senate Report on H. R. 1203, which bill in amended form became the Act of December 23, 1943:

> * * * The Department's principal desire for the enactment of this bill is that the United States be protected against being compelled to disclose its facts involved in any criminal prosecution it may have undertaken or is about to undertake. Their

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[4] This abuse is graphically illustrated by the facts involved in *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48 (C. C. A. 8), vacated and remanded following passage of the amendatory act for proceedings in conformity with that act, *sub nom. Nathanson* v. *United States*, 321 U. S. 744, 746.

> experience has shown that upon filing of such civil suits, steps are soon taken to compel discovery, by taking deposition and otherwise, in the civil suits, to ascertain the facts upon which the Government is proceeding. All such matters tend to embarrass the Government in its conduct of criminal prosecutions and to assist the defendants in such prosecutions in obtaining what they otherwise would not be entitled to obtain and could not secure. (S. Rep. No. 291, 78th Cong., 1st Sess., p. 3).[5]

It is thus clear that the amendatory act was primarily designed to vest in the Attorney General control over all litigation instituted under the earlier legislation or thereafter in order that private civil suits might not impair the effective enforcement by the United States of the criminal sanctions provided in Rev. Stat. 5438 for the commission of frauds upon it. The elaborate control

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[5] Compare also the statement quoted by the Senatorial manager of the Bill (89 Cong. Rec. 7571):

"To offset this condition the Department of Justice has undertaken to file civil actions at the same time that indictments are returned. But this has been found impractical. The exact time an indictment will be returned can rarely be anticipated. Moreover, this makeshift practice does not give adequate time in which to prepare proper pleadings.

"I believe that the Congress should by legislation put a stop to this unseemly and undignified scramble. The Government should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and contents of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available."

provisions of the amendatory act achieved this end, permitting the Attorney General a sixty-day period within which to assay the merits of *qui tam* actions then pending or thereafter filed, and also an opportunity to prevent the defendants in criminal proceedings from utilizing such civil suits as vehicles for discovering information which they could not obtain in the criminal cases themselves. Under the amendatory act, the latter objective may be achieved either by entering an appearance and thereby obtaining an exclusive control over and right to carry on the *qui tam* suit, or by refraining from so doing and demonstrating to the court that the suit, still in private hands, had been commenced on Government information, thereby causing its dismissal.

Plainly, in the light of the foregoing, the amendatory act cannot be deemed to have intended to immunize petitioners from making statutory restitution to the United States in the event they are found to have committed the frauds alleged. As held in the *Hess* case, *supra,* the instant *qui tam* action could not have been defeated prior to the passage of the amendatory legislation on the ground that it was not based on independent knowledge, and, if sustained on the merits, would have resulted in a recovery to the Government of one-half the damages and forfeitures provided in Rev. Stat. §§ 3490 and 5438.[6] It is sub-

[6] The construction placed on the amendatory act by the court below, of course, in no way increases petitioners' potential liability, since the remaining half of the prescribed

mitted that the court below, upon consideration of the language and the legislative history of the amendatory act, properly refused to construe the act as depriving the United States of any right of recourse against petitioners for the frauds alleged.[7]

CONCLUSION

The decision below is correct and no conflict exists. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1946.

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recovery would have gone to the *qui tam* plaintiff. By virtue of clause E (1) of the amendatory act, however, any recovery now obtained will go entirely to the Government since the *qui tam* plaintiff made no contribution to the discovery of the alleged frauds.

[7] Petitioners' contention that the jurisdictional limitation is applicable to *qui tam* suits being carried on by the Government would produce equally absurd results when applied to *qui tam* actions brought after the amendatory act. Since under petitioners' construction the limitation applies, irrespective of an appearance by the Government, "whenever it shall be made to appear" that the facts upon which the *qui tam* action was based were within the prior knowledge of a Government officer or agent, a suit taken over by the Government in the belief that it was a genuine informer action would be subject to dismissal even following a trial on the merits if it could then be shown that some person in the widespread Government employ had such prior knowledge.

APPENDIX A

Sections 3490–3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C. 231–234) read as follows prior to the Act of December 23, 1943:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.
>
> SEC. 3491. (As amended by the Act of June 25, 1936, 49 Stat. 1921) The several district courts of the United States, the district court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the con-

sent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Section 5438 of the Revised Statutes (12 Stat. 696, 31 U. S. C. 231) reads as follows:

SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with

intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

APPENDIX B

Public Law 213, 78th Congress, 1st Session, approved December 23, 1943, 57 Stat. 608, 31 U. S. C. Supp. IV 232, reads as follows:

AN ACT To limit private suits for penalties and damages arising out of frauds against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3491 of the Revised Statutes (U. S. C., title 31, sec. 232) be, and it hereby is, amended to read as follows:

"SEC. 3491 (A). The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

it shall be
"(C) Whenever any such suit clause (B)
brought by any person under cl uit shall be
notice of the pendency of such su rving upon
given to the United States by ser the district
the United States attorney for th brought a
in which such suit shall have been d by send-
copy of the bill of complaint and Attorney
ing, by registered mail, to the Washing-
General of the United States at py of such
ton, District of Columbia, a copy writing of
bill together with a disclosure in information
substantially all evidence and in e effective
in his possession material to the ited States
prosecution of such suit. The Uni e as above
shall have sixty days, after servic ppearance
provided, within which to enter a tates shall
in such suit. If the United St court, dur-
fail, or decline in writing to the c enter any
ing said period of sixty days to y on such
such suit, such person may carry n said pe-
suit. If the United States withi ch suit the
riod shall enter appearance in suc ly by the
same shall be carried on solely such suit
United States. In carrying on nd by any
the United States shall not be bou brought it,
action taken by the person who b s if it were
and may proceed in all respects as hat if the
instituting the suit: *Provided,* T y on such
United States shall fail to carry period of
suit with due diligence within a ppearance
six months from the date of its a al time as
therein, or within such additiona such suit
the court after notice may allow, n bringing
may be carried on by the person lause (B)
the same in accordance with clarisdiction
above. The court shall have no jurght under
to proceed with any such suit brought under
clause (B) or pending suit brougtes when-
section 3491 of the Revised Statut that such
ever it shall be made to appear

suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

"(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

"(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

"(2) In any such suit when not carried on by the United States as herein provided,

whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

SEC. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

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